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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR HENRY SNELL, JR.,

Defendant and Appellant.

D074101

(Super. Ct. No. SCD273557)

APPEAL from a judgment of the Superior Court of San Diego County, Yvonne Esperanza Campos, Judge. Affirmed and remanded for resentencing.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Seth M. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Arthur Henry Snell, Jr., appeals from a final judgment of conviction following a jury trial that found him guilty of battery with serious bodily injury in violation of Penal Code¹ section 243, subdivision (d), and found true an allegation that he personally inflicted great bodily injury within the meaning of section 1192.7, subdivision (c)(8). The court found true five prior felony offenses for purposes of probation ineligibility, two prior strikes, and two prior serious felonies deriving from the same conviction which the court considered as one prior serious felony enhancement.

The court dismissed one of Snell's prior strikes for purposes of sentencing. The court sentenced Snell to 13 years in prison, consisting of the upper term of four years, doubled to eight years by the remaining prior strike, and included a then-mandatory five-year enhancement pursuant to section 667, subdivision (a)(1) for a prior serious felony conviction.

On September 30, 2018, the Governor signed Senate Bill No. 1393, which became effective on January 1, 2019. Senate Bill No. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony enhancement for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971 (*Garcia*).) Snell contends that Senate Bill No. 1393 applies retroactively and that his case must be remanded to the trial court to exercise its discretion to strike the five-year prior serious felony enhancement. (§ 667, subd. (a).)

¹ Undesignated statutory references are to the Penal Code.

The People concede the issue and agree that the new law applies to Snell's case because the judgment in his case was not final at the time the law went into effect.

We agree that Snell is entitled to the benefit of the new law. Accordingly, we vacate the sentence and remand for resentencing, but affirm the conviction in all other respects.

DISCUSSION²

Before the enactment of Senate Bill No. 1393, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony." (Former § 667, subd. (a)(1).) The court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

In *Garcia*, *supra*, 28 Cal.App.5th 961, Division Two of this district agreed with the position taken by both Snell and the People and held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as its conclusion. We thus accept the People's concession that the amendments to Senate Bill No. 1393 apply retroactively to Snell's case and entitle him to resentencing.

² Snell does not challenge his conviction and the facts of the underlying conviction are not relevant to the issue presented on appeal. Accordingly, we omit the usual factual and procedural background.

Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Here, there is no indication in the record that the trial court would not have exercised its discretion to strike the enhancement. (*Id.* at p. 425 [remand an idle act if record shows that the trial court would not have exercised its discretion even if it believed it could do so].) On the contrary, the judge said to Snell, "I'm going to give you some discretion, okay. . . . [¶] . . . I'm taking some of those things into account . . . but you still have a whole lot of things stacked against you."

Remand is therefore appropriate to allow the trial court to exercise its new discretion to strike or dismiss the five-year prior serious felony enhancement. We express no opinion on how the trial court should exercise its discretion.

II. DISPOSITION

The matter is remanded to the trial court to consider whether to exercise its discretion to strike or dismiss the five-year prior serious felony enhancement, and, if appropriate following exercise of that discretion, to resentence defendant accordingly and

provide a corrected abstract of judgment to the appropriate agencies. The judgment is otherwise affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.